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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANDRES H. MENDOZA,

Petitioner,

vs.

WARDEN LEGRAND, *et al.*,

Respondents.

3:13-cv-00607-RCJ-WGC

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on a *sua sponte* inquiry into whether the amended petition is subject to dismissal with prejudice on the basis of procedural default, as well as on petitioner's motion (#13) for an extension of time and motion (#14) for appointment of counsel. This order follows upon a prior show-cause order (#12) and petitioner's response (#15) thereto.

Background

The show-cause order outlined the following procedural history based on the papers on file and the online docket records of the Nevada state courts. *See, e.g., Harris v. County of Orange*, 682 F.3d 1126, 1132-32 (9th Cir. 2012)(a federal court may take judicial notice of matters of public record, including documents on file in federal or state courts). Petitioner does not dispute the procedural history in his response.

Petitioner Andres Mendoza seeks to challenge his Nevada state conviction, pursuant to an *Alford* plea, of attempt lewdness with a child under the age of 14 and attempt sexual assault of a minor under the age of 14. The original judgment of conviction was filed on May 27, 2009, in No. C253233 in the state district court. Petitioner did not file a direct appeal.

1 Three years later, on June 27, 2012, petitioner filed a proper person motion seeking
2 an additional twelve days of pre-sentence credit for time served. The state district court
3 entered an amended judgment of conviction on August 6, 2012, which corrected the amount
4 of credit for time served by four days. Petitioner appealed the district court's ruling on the
5 motion, and the Supreme Court of Nevada affirmed in an April 9, 2013, order of affirmance
6 in No. 61545 in that court. The ninety-day time period for seeking *certiorari* review in the
7 United States Supreme Court expired on July 8, 2013.

8 Meanwhile, on May 6, 2013, petitioner filed a proper person state post-conviction
9 petition, which was denied as untimely on August 20, 2013. Petitioner did not appeal.

10 During the pendency of the first state petition, on July 29, 2013, petitioner filed a proper
11 person second state post-conviction petition, which was denied on October 28, 2013. The
12 Supreme Court of Nevada affirmed the dismissal of the second petition as untimely and an
13 abuse of writ in an April 10, 2014, order of affirmance in No. 64355 in that court. The
14 remittitur issued on May 5, 2014.

15 In federal court, petitioner mailed his initial suit papers to the Clerk for filing on or about
16 October 31, 2013. On February 18, 2014, the Court dismissed the original papers without
17 prejudice, with an opportunity to amend, because nothing in petitioner's original bare papers
18 set forth any claim for relief. On or about February 25, 2014, petitioner mailed the amended
19 petition herein to the Clerk for filing.

20 ***Discussion***

21 Pursuant to *Boyd v. Thompson*, 147 F.3d 1124 (9th Cir. 1998), the Court has found
22 that the interests of comity, federalism and judicial efficiency are served by the Court *sua*
23 *sponte* raising the question of whether all grounds presented are barred by procedural default.

24 Petitioner asserts in the amended petition that "all of the grounds for this petition have
25 been presented to the . . . Nevada Supreme Court." #10, at 3 (electronic docketing page 4).
26 The Court accordingly has proceeded for purposes of the present show-cause inquiry on an
27 *arguendo* assumption that all of the claims in the amended federal petition were exhausted
28 in No. 64355 in the state supreme court, *i.e.*, on the appeal from the denial of the second

1 state petition. The claims in the amended federal petition are directed to alleged errors
2 occurring in connection with the original 2009 judgment of conviction.

3 The Court further has proceeded on additional *arguendo* assumptions that: (a) the
4 amended federal petition is timely because it was filed within one year of the July 8, 2013,
5 expiration of the time to seek *certiorari* review following the appeal from the amended
6 judgment of conviction; (b) a state court amended judgment of conviction that changes only
7 four days of credit for time served constitutes a “resentencing” for purposes of the Supreme
8 Court’s decision in *Magwood v. Patterson*, 130 S.Ct. 2788 (2010); and (c) the amended
9 judgment of conviction thus qualifies as an intervening new judgment for purposes of applying
10 the federal limitation period as well as in applying successive petition rules as in *Magwood*.
11 *Cf. Wentzell v. Neven*, 674 F.3d 1124, 1126-29 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2336
12 (2013)(under *Magwood*, an amended judgment of conviction entered following a reversal and
13 dismissal of one count constituted an intervening new judgment for purposes of federal
14 successive petition rules).

15 The show-cause order outlined the impact of *Magwood* on this case under these
16 *arguendo* assumptions:

17 With those *arguendo* assumptions, petitioner indeed would
18 be correct that the present federal habeas action is timely under
19 28 U.S.C. § 2244(d)(1)(A). Both the original papers and the
20 amended petition were filed within one year of the July 8, 2013,
21 expiration of the time period for seeking *certiorari* review in the
22 Supreme Court.

23 Petitioner is not correct, however, that the state courts
24 therefore were required to find that his *state* petitions were timely
25 under *state* procedural rules. Rather, the *Magwood* Court
26 expressly confirmed that state procedural bars – such as state
27 timeliness, successive petition and abuse of writ rules – remain
28 applicable. *Magwood* recognized that state procedural bars
would constitute the primary limitation upon inmates being able
to do what petitioner seeks to do here. That is, *Magwood*
expressly recognized that state procedural bars generally would
preclude inmates from relitigating the validity of an otherwise
long-since final conviction because of an intervening amendment
where the petitioner’s challenge in truth is directed to the validity
of the original proceedings rather than to a change made in the
amended judgment. See *Magwood*, 130 S.Ct. at 2801-02;
Wentzell, 674 F.3d at 1127.

1 In this case, the Supreme Court of Nevada held that all
2 claims presented to that court were barred under state timeliness
3 and abuse of writ rules. The court applied established state case
4 law, which had been on the books long before *Magwood*, holding
5 that the filing of an amended judgment of conviction does not
6 provide a basis for raising challenges unrelated to the
7 amendment. See *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d
8 761, 764 (2004).

9 #12, at 3 (emphasis in original).

10 Under the procedural default doctrine, federal review of a habeas claim may be barred
11 if the state courts rejected the claim on an independent and adequate state law ground due
12 to a procedural default by the petitioner. Review of a defaulted claim will be barred even if the
13 state court also rejected the claim on the merits in the same decision. Federal habeas review
14 will be barred unless the petitioner can demonstrate either: (a) cause for the procedural default
15 and actual prejudice from the alleged violation of federal law; or (b) that a fundamental
16 miscarriage of justice will result in the absence of review. See, e.g., *Bennet v. Mueller*, 322
17 F.3d 573, 580 (9th Cir. 2003).

18 Petitioner seeks to establish cause and prejudice. To demonstrate cause for a
19 procedural default, the petitioner must establish that some external and objective factor
20 impeded his efforts to comply with the state's procedural rule. E.g., *Murray v. Carrier*, 477
21 U.S. 478, 488 (1986); *Hivala v. Wood*, 195 F.3d 1098, 1105 (9th Cir. 1999). To satisfy the
22 prejudice requirement, he must show that the alleged error resulted in actual harm. E.g.,
23 *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998). Both cause and prejudice must be
24 established. *Murray*, 477 U.S. at 494.

25 Petitioner maintains:

26 The cause is or was [ineffective assistance of
27 counsel] during initial post conviction review that has
28 forced petitioner to file a successive petition the
prejudice lies wherein petitioners [sic] meritorious
claims as presented by the habeas in this matter as
such petitioner seeks leave to evade the bar based
upon (Martinez v. Ryan US Supreme Court 2012).

#15, at 2.

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1 The decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), does not provide a basis for
2 overcoming the procedural default of the claims that petitioner exhausted on the second state
3 post-conviction appeal. *Martinez* holds that “[w]here, under state law, claims of ineffective
4 assistance of trial counsel must be raised in an initial-review collateral proceeding, a
5 procedural default will not bar a federal habeas court from hearing a substantial claim of
6 ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel
7 or counsel in that proceeding was ineffective.” 132 S.Ct. at 1320.¹

8 *Martinez* has no application to this case because the exhausted claims were
9 procedurally defaulted in petitioner’s *second* state post-conviction proceeding.

10 Petitioner nonetheless urges that he was “forced” to file the successive second petition
11 because of alleged ineffective assistance of counsel during “initial post conviction review” on
12 the proper person first state petition. Nothing in *Martinez* provides for such “bootstrapped”
13 cause for a procedural default of claims on a second petition because of the absence or
14 ineffective assistance of counsel on a first petition. If petitioner had exhausted his claims in
15 the first petition by filing an appeal to the state supreme court – which he did not – then a
16 *Martinez* issue potentially would have been presented on federal review if the state supreme
17 court had held that ineffective-assistance claims were procedurally barred. However,
18 petitioner did not exhaust the claims in the first petition; claims presented in the first petition
19 thus are not before this Court as such; and petitioner instead must overcome the procedural
20 default of the exhausted claims in his *second* petition. The second petition was not the initial-
21 review collateral proceeding under *Martinez*.

22 Moreover, the claims in the first petition did not reach the Supreme Court of Nevada
23 because the proper person petitioner did not appeal the state district court’s denial of the first
24 petition. *Martinez* reaffirmed the long-established rule under *Coleman v. Thompson*, 501 U.S.

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27 ¹The Ninth Circuit has extended *Martinez* to apply to the procedural default of claims of ineffective
28 assistance of counsel on the direct appeal that were not raised in the initial-review collateral proceeding due
to ineffective assistance or the absence of post-conviction counsel. See *Ha Van Nguyen v. Curry*, 736 F.3d
1287 (9th Cir. 2013).

1 722 (1991), that the absence or ineffectiveness of counsel on a state post-conviction appeal
2 does not provide a basis for cause to overcome a procedural default. *See Martinez*, 132 S.Ct.
3 at 1312 & 1321. Petitioner thus is maintaining that he was “forced” to file a second petition
4 due to a circumstance – not pursuing an appeal *pro se* from the denial of the first petition –
5 that would not itself provide a basis for cause under *Martinez* in the first instance.

6 Further, in all events, nothing in *Martinez* holds that a noncapital habeas petitioner can
7 overcome the failure to timely file an initial-review collateral proceeding on the basis that he
8 did not have pre-filing counsel to prepare and file a timely state petition. Petitioner’s first
9 petition was untimely under Nevada state law by nearly three years. Nothing in *Martinez* as
10 a practical matter requires the States to appoint pre-filing state post-conviction counsel in
11 noncapital cases following every judgment of conviction by holding that a petitioner who fails
12 to file a timely state petition *pro se* has cause for that failure due to the lack of counsel.

13 Thus, petitioner’s effort to establish cause for the procedural default of the exhausted
14 claims in the second state petition – by “bootstrapping” his way back through his failure to
15 appeal the denial of his first petition then to his failure to file a timely first petition in the first
16 instance – is wholly without merit. The issue before the Court instead is the procedural default
17 of the only exhausted claims before the Court – the claims in the second petition. Moreover,
18 even if the Court took into account the proceedings on the first petition on that issue, the
19 intervening *pro se* failures in failing to timely file the first petition and then failing to appeal the
20 denial of that petition do not provide a basis for cause under *Martinez* premised upon an
21 absence of counsel.

22 Petitioner accordingly has failed to establish cause for the procedural default of the
23 claims in the second state petition now presented on federal review.²

24 A petitioner who cannot show cause and prejudice still may obtain review of his
25 defaulted claims if he can demonstrate that the failure to consider the claims would result in
26 a fundamental miscarriage of justice. Petitioner makes a conclusory assertion that the failure
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28 ²Petitioner’s conclusory assertion of prejudice further fails to satisfy that requirement as well.

1 to hear the federal petition “will create an undue miscarriage of justice.” #15, at 2. The show-
2 cause order clearly stated:

3 In noncapital cases, however, this exception has been
4 recognized only for petitioners who can demonstrate actual
5 innocence. *E.g., Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir.
6 1997). To demonstrate actual innocence, a petitioner must come
7 forward with new reliable evidence tending to establish his
8 innocence, *i.e.*, tending to establish that no juror acting reasonably
would have found him guilty beyond a reasonable doubt, as to all
charges pending against him in the case prior to the plea. See
Schlup v. Delo, 513 U.S. 298 (1995); *Bousley v. United States*,
523 U.S. 614 (1998).

9 #12, at 4. A petitioner who asserts only alleged constitutional or other violations without also
10 establishing actual innocence under the narrow and demanding *Schlup* gateway therefore fails
11 to meet the standard for the miscarriage of justice exception. See, *e.g., Johnson v. Knowles*,
12 541 F.3d 933, 937 (9th Cir. 2008); *Poland*, 117 F.3d at 1106.

13 Petitioner’s conclusory assertion accordingly does not even begin to shoulder the
14 burden that he must shoulder under *Schlup*. The show-cause order also clearly stated:

15 If petitioner responds but fails to demonstrate, with
16 competent supporting evidence, that the petition is not subject to
dismissal, the petition will be dismissed with prejudice.

17 All assertions of fact must be specific as to time and place
18 and supported by competent evidence. Any assertions of fact not
19 made pursuant to an affidavit, declaration under penalty of perjury,
or other competent and admissible evidence will be disregarded
by the Court.

20 #12, at 5.

21 Petitioner accordingly has failed to carry his burden of presenting a potentially viable
22 basis for overcoming the procedural default of the only exhausted claims before the Court.
23 The amended petition therefore will be dismissed with prejudice under the procedural default
24 doctrine.

25 ***Pending Motions***

26 The motion for an extension of time to respond to the show-cause order will be denied
27 as moot after petitioner filed his response within the allowed time period. The Court did not
28 deny the extension motion prior to the filing of the show-cause response. Petitioner instead

1 unilaterally opted to file a response without waiting first for a ruling on the pending extension
2 motion. Nothing in this Court's orders required that petitioner act without waiting for a ruling
3 on a pending extension request. The Court had stated neither that an extension request would
4 not be considered nor that the Court would dismiss the matter upon the expiration of the
5 original filing deadline notwithstanding a pending extension request.

6 On the counsel motion, the Sixth Amendment right to counsel does not apply in habeas
7 corpus actions. See *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). However, 18
8 U.S.C. § 3006A(a)(2)(B) authorizes a district court to appoint counsel to represent a financially
9 eligible habeas petitioner whenever "the court determines that the interests of justice so
10 require." The decision to appoint counsel lies within the discretion of the court; and, absent
11 an order for an evidentiary hearing, appointment is mandatory only when the circumstances
12 of a particular case indicate that appointed counsel is necessary to prevent a due process
13 violation. See, e.g., *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986); *Eskridge v. Rhay*,
14 345 F.2d 778, 782 (9th Cir.1965).

15 The Court does not find that the interests of justice require the appointment of counsel.

16 Petitioner maintains that the inmate who has been assisting him no longer is able to
17 comprehend the purportedly complex issues at hand, which "involve a state bar versus a
18 federal and the implications that such mandates." There is no such federal-state complexity
19 in this matter. As the Court's orders have outlined, petitioner's claims must be dismissed with
20 prejudice unless he can overcome the procedural default of his claims following the state
21 courts' rejection of his claims on procedural grounds. Petitioner's mistaken initial belief that
22 an amended judgment of conviction would overcome the application of state procedural bars
23 does not make the issue either a complex one or one involving a conflict between federal and
24 state law. That is, merely because the inmate assisting petitioner has had no effective
25 response after petitioner's initial operating premise proved to be fallacious does not provide
26 a basis for appointment of counsel.

27 Petitioner's conclusory references to his "limited" education and to Spanish being his
28 "primary" language do not establish that he is unable to respond to the show-cause order with

1 the inmate assistance that he acknowledges is available to him. At the very least with that still-
2 continuing assistance, the papers presented herein do not reflect that petitioner's ability to
3 respond to the show-cause order has been adversely impacted by an allegedly limited English
4 language ability. Rather, the fundamental difficulty faced instead was the flawed premise upon
5 which this action was initiated.

6 Nor does the aggregate 8 to 20 year sentence on the early 2009 conviction,
7 comparatively, weigh strongly in favor of appointing counsel.

8 The Court therefore will deny the motion for appointment of counsel.

9 IT THEREFORE IS ORDERED that the petition, as amended, shall be DISMISSED with
10 prejudice as procedurally defaulted.

11 IT FURTHER IS ORDERED that a certificate of appealability is DENIED. Jurists of
12 reason would not find the district court's dismissal of the petition as amended on the basis of
13 procedural default to be debatable or incorrect. Petitioner cannot establish cause under
14 *Martinez* for the procedural default of the claims exhausted in his second state post-conviction
15 petition. Petitioner otherwise has not satisfied the exception for a fundamental miscarriage
16 of justice with a conclusory assertion that a failure to hear the claims will result in an undue
17 miscarriage of justice.

18 IT FURTHER IS ORDERED that petitioner's motion (#13) for an extension of time is
19 DENIED as moot following upon petitioner's instead filing a response within the time allowed.

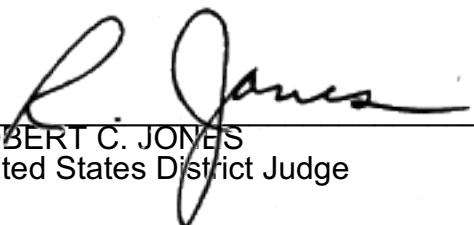
20 IT FURTHER IS ORDERED that petitioner's motion (#14) for appointment of counsel
21 is DENIED.

22 IT FURTHER IS ORDERED that, pursuant to Rule 4 of the Rules Governing Section
23 2254 Cases, the Clerk of Court shall provide respondents with notice of the action taken
24 herein by effecting informal electronic service of the order and judgment upon Catherine
25 Cortez Masto as per the Clerk's current practice, together with regenerating notices of
26 electronic filing to her office of the prior filings herein. **No response is required from**
27 **respondents, other than to respond to any orders of a reviewing court.**

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1 The Clerk of Court shall enter final judgment accordingly, in favor of respondents and
2 against petitioner, dismissing this action with prejudice.

3 DATED: July 8, 2014

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7 ROBERT C. JONES
8 United States District Judge
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